ARUNAMARI PLANTATIONS SDN BHD & ORS A

v.

LEMBAGA MINYAK SAWIT MALAYSIA & ORS AND OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ANANTHAM KASINATHER JCA
LIM YEE LAN JCA
[CIVIL APPEALS NO: W-01-248-2010, W-01-282-2010 C
& W-01-537-2010]
5 SEPTEMBER 2012

REVENUE LAW: *Taxing statute - Construction of - Components of - Whether tax may be imposed by subordinate legislation - Whether tax* D *may be imposed by executive order - Cess Order 2007 imposing cess on certain oil palm fruit producers - Whether contrary to tax law - Whether discriminatory in nature - Whether ultra vires art. 96 Federal Constitution*

REVENUE LAW: *Taxing statute - Construction of - Principles of* E *construction - Whether confined to literal interpretation of words used - Whether words construed in context and scheme of Act as a whole*

STATUTORY INTERPRETATION: *Taxing statute - Construction of* F *- Components of - Whether tax may be imposed by subordinate legislation - Whether tax may be imposed by executive order - Cess Order 2007 imposing cess on certain oil palm fruit producers - Whether contrary to tax law - Whether discriminatory in nature - Whether ultra vires art. 96 Federal Constitution - Malaysian Palm Oil Board Act 1998, s. 33(1)* G

STATUTORY INTERPRETATION: *Taxing statute - Construction of - Principles of construction - Whether confined to literal interpretation of words used - Whether words construed in context and scheme of Act as a whole - Malaysian Palm Oil Board Act 1998, s. 33(1)* H

Pursuant to s. 35(1) of the Malaysian Palm Oil Board Act 1998 ('the Act'), the second respondent issued a Cess Order 2007 ('Order'), effective from 1 June 2007, which was applicable to oil palm fruit producers. The second respondent, acting under s. 77 I of the Act exempted, *inter alia*, government or government related land schemes, oil palm fruit producers with oil palm holdings less than 40.46 hectares, end-product manufacturers, suppliers and

A wholesalers from the Order. The Order was introduced to subsidise the price of cooking oil at the time and was revoked on 1 August 2008. The appellants, who had paid cess under the Order, applied to have the order declared null and void so as to recover the cess paid. The High Court declared the Order to be
B *ultra vires* the Act, and consequently void and illegal. However, the judge proposed that the appellant file a separate action for the refund of the cess collected. Hence, the appellant appealed to the Court of Appeal.

C **Held (allowing appeal in Civil Appeal No: W-01-248-2010 and ordering a refund of the paid cess)**
Per Anantham Kasinather JCA delivering the judgment of the court:

D **(1)** The Order was issued by way of subsidiary legislation pursuant to s. 35 of the Act. Although there cannot be tax by an executive order, tax can be imposed by subordinate legislation provided the statute under which it is made "specially authorizes the imposition". A taxation statute, whether by way of principal or subsidiary legislation must contain the three
E components of tax law, ie, the subject of the tax, the person liable to pay the tax and the rate at which the tax is to be paid. (para 8)

(2) Once cess is accepted as a form of tax, the statute seeking to
F impose tax must "specifically authorize the imposition". The cess collected through the Order could only be applied for the expressly listed purposes in s. 33(1) of the Act. In construing the expressly listed purposes, the court is not confined to undertaking a literal interpretation of the words therein but is
G permitted to construe the listed purposes in the context and scheme of the relevant Act as a whole. In the instant case, even after giving the listed purposes an interpretation having regard to the objectives of the Act, this court was unable to confer a meaning on the listed purposes which would render
H valid the subsidising of the price of cooking oil (*BC Banerjee v. State of Madhya Pradesh*; foll). (para 20)

(3) The trial judge was correct in finding that because the collected cess was used for purposes outside the scope of
I "s. 33(2) of the Act, the Order was *ultra vires* the said Act and consequently was void and illegal. (para 21)

(4) Section 35 of the Act did not authorise the collection of cess for the purpose of subsidising the price of cooking oil. In the absence of any provision in s. 35(1) of the Act authorising the collection of cess for the purpose of subsidising the price of cooking oil, for the Minister to impose such a tax would for all intents and purposes amount to the imposition of cess by executive order (*Shree Digvijay Cement Co Ltd v. Union of India*; foll). (para 22)

(5) Section 35(1) of the Act is silent on the person who is to be charged with tax. Section 35(1) delegates the identity of the person to be subject to tax to the relevant Minister who by order is to specify "the person or class of persons on whom the cess is imposed". This delegation of the selection of the persons to be charged with tax to the second respondent effectively amounts to the identification of the person to be charged with tax to the second respondent without the "authority of federal law", which is prohibited by art. 96 of the Federal Constitution (*Russell v. Scott*; foll). (para 23)

(6) Since the Order infringes two of the three components of tax law, it follows that the said Order is *ultra vires* art. 96 of the Federal Constitution. (para 23)

(7) Section 35(1) of the Act does not contain any basis or guidelines to assist the second and third respondents in the matter of selection or classification of the persons to be subject to the payment of the cess. The powers conferred on the second respondent to determine the persons to be subject to tax are so wide and without any policy guidelines so as to render the delegation arbitrary and uncontrollable. The instant case was a case where one category of persons was targeted for tax against others similarly situated without a reasonable basis for their selection. The singling out of the fruit producers only for the imposition of the cess was arbitrary and discriminatory. Thus, the Order was a piece of discriminatory law. (para 27)

(8) There were no guidelines to regulate the exercise by the second respondent of his discretion to exempt persons or classes of persons from any provision of the Act under s. 77. Section 77 thus would fall within category (e) of the five

A categories adopted by the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*. In the absence of any principle or policy for guiding the exercise of discretion by the second and third respondents in the Act, the court was not required to examine the basis contained in the affidavits affirmed by the B second respondent upon which the discretion was said to have been exercised (*Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*; foll). (para 28)

(9) The claim in the affidavits affirmed by the second respondent, C even if true, could not constitute *intelligible differentia* so as to satisfy the reasonable classification test adopted by the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*. Neither could those facts justify their exemption from having to pay the cess. (para 29)

D ***Bahasa Malaysia*** *Translation Of Headnotes*

Melalui s. 35(1) Akta Lembaga Minyak Sawit Malaysia 1998 ('Akta'), responden kedua telah mengeluarkan Perintah Ses 2007 ('Perintah'), berkuatkuasa dari 1 Jun 2007, yang terpakai kepada E pengeluar minyak kelapa sawit. Responden kedua, yang bertindak di bawah s. 77 Akta mengecualikan, antara lain, kerajaan atau pun skima tanah berkaitan dengan kerajaan, pengeluar minyak kelapa sawit dengan pegangan kelapa sawit kurang daripada 40.46 hektar, pengeluar akhir produk, pembekal dan pemborong daripada F Perintah. Perintah diperkenalkan untuk memberi subsidi kepada harga minyak masak pada masa itu dan telah dibatalkan pada 1 Ogos 2008. Perayu-perayu, yang telah membayar ses di bawah Perintah, memohon supaya perintah itu diisytiharkan batal dan tidak sah bagi mendapat kembali ses yang telah dibayar. G Mahkamah Tinggi telah mengisytiharkan Perintah sebagai *ultra vires* Akta, dan seterusnya tak sah dan salah di sisi undang-undang. Walau bagaimanapun, hakim bercadang supaya perayu memfailkan tindakan berasingan bagi pemulangan bayaran ses yang dikumpul. Oleh itu, perayu merayu ke Mahkamah Rayuan.

H **Diputuskan (membenarkan rayuan dalam Rayuan Sivil No: W-01-248-2010 dan bayaran ses diperintah untuk dikembalikan)**

Oleh Anantham Kasinather HMR menyampaikan penghakiman I **mahkamah:**

(1) Perintah telah dikeluarkan melalui perundangan subsidiari berikutan s. 35 Akta. Walaupun tiada cukai melalui perintah eksekutif, cukai bolehlah dikenakan melalui undang-undang kecil

asalkan statut di mana ianya dibuat "secara khas membenarkan pengenaan". Statut percukaian, sama ada melalui perundangan prinsipal atau subsidiari mestilah mengandungi tiga bahagian undang-undang percukaian, iaitu, subjek percukaian, orang yang bertanggungjawab membayar cukai dan kadar di mana cukai hendaklah dibayar.

(2) Apabilah ses diterima sebagai sejenis cukai, statut yang hendak mengenakan cukai mestilah "secara khas membenarkan pengenaan". Ses yang dikumpul melalui Perintah hanya boleh dipakai untuk kehendak yang dinyatakan secara ekspres di "bawah s. 33(1) Akta. Dalam mentafsirkan kehendak yang dinyatakan secara ekspres itu, mahkamah tidak membatas dengan mengambil tafsiran literal perkataan-perkataan di dalamnya tetapi dibenarkan mentafsir kehendak yang dinyatakan dalam konteks dan skima Akta relevan secara keseluruhannya. Di dalam kes ini, walaupun selepas memberi kehendak yang dinyatakan dengan mengambilkira objektif Akta, mahkamah ini tidak dapat memberi maksud terhadap kehendak yang dinyatakan itu yang akan membuatkan subsidi harga minyak masak sah (*BC Banerjee v. State of Madhya Pradesh*; diikuti).

(3) Hakim perbicaraan betul dalam mendapati bahawa disebabkan ses yang dikumpul digunakan bagi kehendak di luar lingkup "s. 33(2) Akta, Perintah adalah *ultra vires* Akta dan seterusnya tak sah dan salah di sisi undang-undang.

(4) Seksyen 35 Akta tidak memberi kuasa untuk mengumpulkan ses bagi kehendak subsidi harga minyak masak. Dalam ketidakhadiran sebarang peruntukan dalam s. 35(1) Akta yang memberi hak kepada pengumpulan ses bagi kehendak subsidi harga minyak masak, bagi Menteri mengenakan cukai seperti itu akan menyebabkan pengenaan ses melalui perintah eksekutif. (*Shree Digvijay Cement Co v. Union of India*; diikuti).

(5) Seksyen 35(1) Akta senyap mengenai orang yang sepatutnya dikenakan cukai. Seksyen 35(1) mewakilkan kepada Menteri berkenaan untuk mengenalpasti orang yang hendak dikenakan cukai, dan Menteri hendaklah melalui Perintah membutirkan "orang atau kelas orang di mana ses dikenakan". Mewakilkan

kuasa memilih orang-orang yang hendak dikenakan cukai kepada responden kedua bererti membenarkan responden kedua mengenalpasti orang yang hendak dikenakan cukai tanpa "kuasa undang-undang persekutuan", yang dilarang oleh perkara 96 Perlembagaan Persekutuan (*Russell v. Scoot*; diikuti).

(6) Memandangkan Perintah melanggar dua daripada tiga komponen undang-undang percukaian, ianya diikuti bahawa Perintah itu adalah *ultra vires* perkara 96 Perlembagaan Persekutuan.

(7) Seksyen 35(1) Akta tidak mengandungi apa-apa asas atau garis panduan untuk membantu responden-responden kedua dan ketiga dalam hal pilihan atau klasifikasi orang-orang untuk dikenakan bayaran ses. Kuasa yang diberi kepada responden kedua bagi menentukan orang-orang yang tertakluk kepada cukai adalah sangat luas dan tanpa sebarang garis panduan sakaligus menyebabkan peruntukan arbirtari dan tidak terkawal. Kes di sini adalah kes di mana satu kategori orang telah menjadi sasaran untuk cukai sementara orang-orang lain yang berkeadaan serupa tidak dikenakan cukai, tanpa ada sebarang asas munasabah bagi pilihan. Mengenakan cukai hanya kepada pengeluar buah-buahan adalah arbitrari dan menindas. Oleh itu, Perintah adalah suatu undang-undang yang menindas.

(8) Seksyen 77 tidak menggariskan sebarang garis panduan untuk pelaksanaan budi bicara responden kedua dalam mengecualikan orang-orang atau kelas orang-orang daripada peruntukan Akta. Seksyen 77 dengan itu jatuh di bawah kategori (e) daripada lima kategori yang dinyatakan oleh Mahkamah Persekutuan dalam *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*. Dalam ketidakhadiran prinsip atau polisi di dalam Akta untuk menjadi panduan bagi pelaksanaan budi bicara responden-responden kedua dan ketiga, mahkamah tidak perlu menguji asas yang terkandung dalam afidavit-afidavit yang diikrarkan oleh responden kedua berdasarkan mana budi bicara dikatakan telah dilaksanakan (*Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*; diikuti).

(9) Tuntutan di dalam afidavit yang diikrarkan oleh responden kedua, walau pun benar, tidak boleh menyebabkan "*intelligible differentia*" bagi memuaskan ujian klasifikasi munasabah yang dinyatakan oleh Mahkamah Persekutuan dalam *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*. Fakta-fakta di situ juga tidak menjustifikasikan pengecualian kepada mereka daripada membayar ses.

Case(s) referred to:
AN Parasuraman v. State of Tamil Nadu AIR [1990] SC 40 ***(refd)***
BC Banerjee v. State of Madhya Pradesh AIR [1971] SC 517 ***(foll)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(foll)***
Datuk Haji Harun Haji Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
KT Moopil Nair v. State of Kerala [1961] 3 SCR 77 ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Russell v. Scott [1948] 2 All ER 1 ***(foll)***
Shree Digvijay Cement Co Ltd v. Union of India AIR [2003] SC 767 ***(foll)***
Shri Ram Krishna Dalmia & Ors v. Shri Justice SR Tendolkar & Ors AIR [1958] SC 538 ***(refd)***
WT Ramsay Ltd v. Inland Revenue Commission [1982] AC 300 ***(foll)***

Legislation referred to:
Federal Constitution, arts. 8, 96
Malaysian Palm Oil Board Act 1998, ss. 2, 33(2)(d), 34, 35(1), 36, 77

(Civil Appeal No: W-01-248-2010)
For the appellants - Cyrus V Das (T Sudhar with him); M/s Shook Lin & Bok
For the 1st respondent - Abdullah Omar; M/s Hisham Sobri & Kadir
For the 2nd & 3rd respondents - Shamsul Bolhassan (Kogilambigai Muthusamy with him); FCs

(Civil Appeal No: W-01-282-2010)
For the appellant - Abdullah Omar; M/s Hisham Sobri & Kadir
For the respondents - Cyrus V Das (T Sudhar with him); M/s Shook Lin & Bok

(Civil Appeal No: W-01-537-2010)
For the 1st appellant - Abdullah Omar; M/s Hisham Sobri & Kadir
For the 2nd & 3rd appellants - Shamsul Bolhassan (Kogilambigai Muthusamy with him); FCs
For the respondents - Cyrus V Das (T Sudhar with him); M/s Shook Lin & Bok

[Editor's note: For the High Court judgment, please see Arunamari Plantations Sdn Bhd & Ors v. Lembaga Minyak Sawit Malaysia & Ors [2011] 2 CLJ 519.]

Reported by Andrew Christopher Simon

A

JUDGMENT

Anantham Kasinather JCA:

Background Facts

B **[1]** Section 35(1) of the Malaysian Palm Oil Board Act 1998 ('Act') provides as follows:

> The Minister may, after consultation with the Minister of Finance, make orders for the imposition, variation or cancellation of a cess on oil palm products produced in or exported from Malaysia and the orders may specify the nature amount and rate of the cess and the manner of collection of the cess.

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[2] Pursuant to s. 35 of the Act, the 2nd respondent issued the Cess Order 2007 effective 1 June 2007. It provides for the levy D and collection of cess by the 1st respondent on oil palm fruit producers and on oil palm fruits. By virtue of the Cess Order 2007, oil palm fruit producers who own:

(a) Oil palm holding which is not less than 40.46 hectares; or

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(b) Oil palm holdings which is aggregate amount to not less than 40.46 hectares;

are required to pay cess for every metric ton of oil palm produced. The Cess Order 2007 imposes a duty or an obligation on oil F palm fruit producers to whom the said order applies to pay the 1st respondent a cess in respect of every metric ton (to the nearest two decimal point) of oil palm fruit.

[3] Section 77 of the Act confers blanket authority to the G 2nd respondent to exempt persons or classes of persons from any provision of the Act. Pursuant thereto, the 2nd respondent expressly exempted the following from paying cess under the Cess Order 2007:

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(a) Any government land scheme with settlers or individuals participant, planted with oil palm; or

(b) Any oil palm small holding owned by individuals but managed and controlled by government agencies.

I Hence, the Cess Order 2007 granted exemption to government or government related land schemes such as FELDA, FELCRA, RISDA, KESEDAR, LKPPP, SALCRA, LKTNS, Koperasi Sungai Manilan and Beliawanis. Further, the Cess Order 2007 does not

apply to oil palm fruit producers who own oil palm holding(s) which is/are less than 40.46 hectares. Neither does the Cess Order 2007 apply to millers, refiners, packers, end-producers, end-product manufacturers, end-product retailers, suppliers and/or wholesalers.

[4] From the evidence led before the High Court, the justification for the introduction of the Cess Order 2007 was that:

(a) Local millers and packers of cooking oil had been operating at a loss, as a consequence of the combined effect of rising prices of crude palm oil and the price ceiling imposed by the Ministry of Domestic Trade and Consumer Affairs on the sale of cooking oil to local consumers;

(b) As a counter measure, the 3rd respondent implemented the Skim Penstabilan Harga Minyak Masak (COSS) 2007 to subsidise the said losses suffered by millers and packers of cooking oil; and

(c) It was decided by the 3rd respondent that a cess would be imposed and collected from some oil palm fruit producers in order to finance the subsidy on 60,000 tons of cooking oil (Olein Sawit) per month, to enable the price ceiling on the sale of cooking oil to local consumers to be maintained without adversely impacting the millers and packers.

[5] The Cess Order was in existence from 1 June 2007 until revoked on 1 August 2008. In the interim, cess had been collected from the appellants under the Order. This suit was commenced by the appellants primarily to have the Cess Order declared null and void, thereby enabling the appellants to recover the cess already paid by them.

Judgment Of The High Court

[6] Although some 18 issues were raised for the consideration of the High Court, the learned trial judge decided in favour of the appellants only on one issue and His Lordship proposed that the appellants file a separate action for the refund of the cess collected. On the only issue that the learned trial judge decided in favour of the appellants, His Lordship after acknowledging that Parliament had authorised the imposition of cess on terms set out in s. 35 of the Act, ruled that the cess collected could only be used for the purposes set out in the s. 33 of the said Act.

Adopting the purposive approach to statutory interpretation including taxing statutes recommended in the Federal Court case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265, His Lordship observed that is was clear that the purpose for the collection of cess was to subsidise the price of cooking oil at the time. His Lordship thereafter after examining s. 33 of the Act opined that in His Lordship view, the use of the cess to subsidise cooking oil was clearly not one of the purposes that cess collected could be utilised by the 1st respondent. His Lordship also opined that from a perusal of ss. 34, 35 and 36 of the Act, there was no provision that enabled the 1st respondent to expend funds outside the scope of s. 33 of the said Act. Accordingly, His Lordship held the impugned cess order to be *ultra vires* the Act and consequently void and illegal.

The Appellants' Case

[7] Learned counsel for the appellants submitted that the learned trial judge had come to the correct decision in declaring the collection of cess under Cess Order 2007 as *ultra vires* the Act. Learned counsel justified the learned trial judge's decision on the grounds that subsidising the price of cooking oil is not an authorised expenditure of the collected funds under s. 33 of the Act. According to the counsel, it is a trite principle in administrative law that a statutory body may not expend funds for an unauthorised purpose. As regards the position adopted by the respondents that the subsidy was within sub-para. (d) of s. 33(2) of the Act, counsel for the appellants submitted that this could not conceivably be the case since sub-para. (d) contemplated the existence of an organisation "related to the oil palm industry" and subsidising cooking oil did not involve an organization and less still the organisation being the recipient of the collected cess.

[8] In support of this appeal that the learned trial judge ought to have ordered the refund of the cess collected from the appellants, learned counsel relied on the same issues addressed to the learned trial judge in the court below. We propose in this judgment to only address some of these issues as we are satisfied that the answers to these issues are sufficient to determine the outcome of this appeal. The first is that Cess Order 2007 contravenes art. 96 of the Federal Constitution. Article 96 of the Federal Constitution provides that no tax shall be levied for the

purposes of the federation "except by or under the authority of federal law". The Cess Order in this case was issued by way of subsidiary legislation pursuant to s. 35 of the Act. Although there cannot be tax by an executive order, tax can be imposed by subordinate legislation provided the statute under which it is made "specially authorizes the imposition". A taxation statute whether by way of principal or subsidiary legislation must contain the three components of tax law ie, the subject of the tax, the person liable to pay the tax and the rate at which the tax is to be paid.

[9] Learned counsel for the appellants submitted that the Cess Order 2007 is invalid because its objective of collecting cess for subsidising the price of cooking oil is not authorised by any federal law. Parliament had not enacted any law providing for taxation on this subject. Section 35(1) of the Act does not also authorise the collection of cess for this purpose. Accordingly, it was the submission of counsel for the appellants that the imposition of the cess for the purposes of subsidising the price of cooking oil was an executive decision without the authority of a federal law. The Indian authority of *Shree Digvijay Cement Co Ltd v. Union of India* AIR [2003] SC 767 was cited to us as authority for this proposition. In this case, a cement levy was struck down by the Indian Supreme Court on the grounds that there was no federal law authorising it and it was held that subordinate legislation could not impose the levy on its own.

[10] Secondly, it was contended that s. 35(1) of the Act is silent as regards the person who is to be charged with tax. Instead s. 35(1) of the Act delegates the identification of the person to be subject to tax to the relevant Minister who by order is to specify "the person or class of persons on whom the cess is imposed". In other words, the submission of counsel for the appellants was that the choice of oil palm food producers such as the appellants to pay the cess was the result of their selection by the Minister. This, counsel for the appellants submitted would amount to a case of imposition of tax by executive order, long considered to be bad in law and void.

[11] The third ground upon which the validity of the Cess Order was challenged by counsel for the appellants was that it was a discriminatory tax in that it gave uncontrolled and arbitrary power to the Minister to pick and choose who to subject to tax. Learned counsel highlighted the provisions of s. 35(1) of the Act which merely gave authority to levy cess on "all palm products" and for the Minister to specify "the person or class of persons"

A on whom the cess is to be imposed. Counsel submitted that having regard to the wide definition of the term "oil palm products" in s. 2 of the Act, the class of persons within the range in the industry falling within this definition would be the oil palm fruit producers, the millers, the refiners, the processors, the
B packers, the end-producers, supplier, wholesalers, the retailers and the distributors. Notwithstanding that the persons falling within the aforesaid category ie, from the fruit producers to the retailers stand on the same footing, meaning that they were all similarly circumstanced, the Minister only selected the fruit producers such
C as the appellants from within this class to be liable to pay the cess under the Cess Order 2007. Counsel for the appellants also drew our attention to the fact that no circumstances were enumerated in any of the affidavits affirmed on behalf of the respondents to justify the collection of cess pursuant to the Cess
D Order 2007 from the fruit producers only. According to counsel for the appellants, in the absence of any justification for the separate treatment of the fruit growers, the Cess Order 2007 would offend art. 8 of the constitution which prohibits discriminatory law.

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[12] Based on the pronouncements of the Indian Supreme Court in the case of *Shri Ram Krishna Dalmia & Ors v. Shri Justice SR Tendolkar & Ors* AIR [1958] SC 538 and our own Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ
F 701, counsel for the appellants submitted that on the facts of this case the appellants had been targeted for tax but not others similarly situated within the class, without any reasonable basis for the selection. The singling out of the fruit producers only for imposition of the cess, according to counsel for the appellants, was
G arbitrary and discriminatory and consequently in contravention of art. 8 of the Constitution. In this respect, counsel for the appellants contended that no explanation had been proffered by the respondents as to why the others such as the millers, the processors, retailers, and distributors, etc, were excused from cess
H payments to subsidise cooking oil prices. Since the Act did not provide any guidelines to assist the 2nd respondent in determining the persons who fall within the category and the Minister did not proffer any reasonable rational for selecting the appellants but not others who are similarly circumstanced, learned counsel for the
I appellants submitted that not only the executive order but the Act itself was void when the principles pronounced in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (supra)* are applied to the facts of this case.

[13] A further ground of discrimination, according to counsel for the appellants, was the granting of exemption to government linked schemes or government managed small holdings. The first category exempted a large group of highly profitable plantations ie, FELDA, FELCRA, RISDA, etc. All the above bodies are also oil palm fruit producers like the appellants and equally successful. For this reason, counsel submitted that there could be no reasonable justification for their exemption and consequently the exemption inherently discriminatory and unreasonable. It was also contended that the inherently discriminatory nature of this exemption may be seen from the fact that cooking oil is consumed by all ie, both the private and public sector and yet this subsidiary legislation only sought to impose the burden of the subsidy on the private sector companies such as the appellants.

The Respondent's Case

[14] The respondents by appeal number 282-2010 and 537-2010 disputed the learned trial judge's ruling that subsidy of the price of cooking oil was in contravention of s. 33 of the Act. The thrust of the submission of learned counsel for the 2nd respondent was that the expenditure by the 1st respondent fell within para. (d) of s. 33 of the Act having regard to the objective of the 1st respondent set out in s. 32 of the Act:

(a) To promote and develop the oil palm and industry of Malaysia and

(b) To develop national objective policies and priority for the orderly development and administration of the oil palm industry in Malaysia.

[15] With reference to paras. 7 and 9 of the second respondent's affidavit in reply and para. 16 of the appellants' originating summons, learned counsel for the 2nd respondent submitted that the learned trial judge had failed to appreciate that the Cess Order 2007 was introduced to assist local millers and packers of cooking oil who had been operating at a loss by subsidising their losses to an extent which would help stabilise the price of cooking oil sold to local consumers without adversely impacting the millers and packers.

[16] As regards the appellants' claim that the Cess Order was discriminatory in nature and in contravention of art. 8 of the Federal Constitution, learned counsel for the 2nd respondent submitted that there was:

(a) An intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group;

(b) The differentia had a rational in relation to the object sought to be achieved by the Act in question, and

(d) There was a nexus between the basis of classification and the object of the Act under consideration.

[17] The intelligible difference, according to counsel for the 2nd respondent, on the facts of this case, is that the appellants do not have the same obligations as the government linked companies. Counsel for the 2nd respondent then cited paras. 21(d) and 23 of the 2nd respondent's affidavit as affording evidence of the different obligations of the respective parties to this appeal (see paras. 21(d) and 23 at p. 286 of vol. 3).

[18] As regards the justification for the exemption of the government linked companies, counsel for the 2nd respondent cited s. 77 of the Act in defence thereof. Section 77 of the Act grants the Minister the power in suitable cases by order published in the gazette to exempt any person or class of persons or any palm oil product or other thing from all or any provisions of this Act. The Minister may impose any terms and conditions as he thinks fit on the granting of such exemption.

Decision Of The Court

[19] The High Court ruled that the Cess Order was *ultra vires* the Act as the cess collected was expended for purposes that fell 'outside the scope of s. 33 of the Act'. Section 33 lists the purposes for which monies collected from the cess order may be lawfully expended. It is not in dispute that the list of purposes set out in s. 33 does not include the subsidising of the price of cooking oil. The question that follows is whether the subsidising of the price of cooking oil is impliedly authorised under s. 33 of the Act and whether implying a purpose is permissible in the interpretation of a tax statute, bearing in mind the ruling of our Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd (supra)* that cess is a form of tax.

[20] Once cess is accepted as a form of tax, it follows that the statute seeking to impose tax must "specifically authorize the imposition" (see *BC Banerjee v. State of Madhya Pradesh* AIR 1971 SC 517). In our judgment, based on the pronouncements of the Supreme Court of India in the case of *BC Banerjee v. State of Madhya Pradesh (supra)* and Lord Wilberforce in the case of *WT Ramsay Ltd v. Inland Revenue Commission* [1982] AC 300 the cess collected through the Cess Order 2007 can only be applied for the expressly listed purposes in s. 33(1) of the Act. We acknowledge that based on the pronouncements of Lord Wilberforce in *WT Ramsay Ltd v. Inland Revenue Commission (supra)*, this court in construing the expressly listed purposes is not confined to undertaking a literal interpretation of the words therein but permitted to construe the listed purposes in the context and scheme of the relevant Act as a whole. Be that as it may, in our judgment, even after giving the listed purposes an interpretation having regard to the objectives of the Act, we are unable to confer a meaning on the listed purposes which would render valid the subsidising of the price of cooking oil.

[21] Neither are we be able to agree with the submission of counsel for the 2nd respondent that the subsidising of the price of the cooking oil is an expenditure with falls within sub-para. (d) of s. 33(2) of the Act. We are in agreement with the submission of counsel for the appellants that there is no 'organization' involved which can be said to be connected in any way with the pricing of cooking oil or which can be said to be the recipient of the cess collected. Section 33(2)(d) refers to the 'organization' as the recipient and not any manufacturer or vendor of cooking oil. Accordingly, in our judgment, the learned trial judge was correct in His Lordship's finding that because the collected cess was used for purposes outside the scope of s. 33(2) of the Act, the cess order is *ultra vires* the said Act and consequently is void and illegal.

[22] The challenge to the validity of the Act based on art. 96 of the Federal Constitution requires us to examine the law relating to what constitutes a valid tax statute. A valid tax statute must contain the three components of tax law ie, the subject of the tax, the person liable to pay the tax and the rate at which the tax to be paid. As regards the subject of the tax, it is conceded by the appellants that the tax can be imposed by subordinate legislation provided the statute under which it is made "specially authorizes the imposition". Counsel for the appellants submitted

A that for this component to be fulfilled, the collection of cess for subsidising the price of cooking oil must be authorised by federal law. Counsel then referred us to s. 35(1) of the Act and submitted that this section did not authorise the collection of cess for this purpose. We agree with counsel for the appellants that in B the absence of any provision in s. 35(1) of the Act authorising the collection of cess for this purpose, for the Minister to impose such a tax for this purpose would to all intents and purposes amount to the imposition of this cess by executive order. The Indian Supreme Court in the case of *Shree Digvijay Cement Co Ltd* C *v. Union of India (supra)* struck down subordinate legislation on the grounds that there was no federal law authorising it. In our judgment, the Cess Order 2007 suffers from the same defect.

[23] As regards the second component, it is significant that D s. 35(1) is equally silent on the person who is to be charged with tax. As submitted by counsel for the appellants, s. 35(1) instead delegates the identity of the person to be subject to tax to the relevant Minister who by order is to specify "the person or class of persons on whom the cess is imposed". We agree with counsel E for the appellants that the delegation of the selection of the persons to be charged with tax to the 2nd respondent effectively amounts to the identification of the person to be charged with tax to the 2nd respondent without the "authority of federal law", which is prohibited by art. 96 of the Federal Constitution. In this F respect, we adopt the pronouncements of Lord Simonds in *Russell v. Scott* [1948] 2 All ER 1 at 5:

> My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the G taxing statute unambiguously impose the tax on him. It is necessary that this maxim should on occasion be re-asserted and this is such an occasion.

Admittedly, Lord Simon's observation was made in relation H to income tax, however, we see no reason why it should not apply with equal force to other forms of tax such as the cess imposed by the Cess Order 2007. Since the Cess Order 2007 infringes two of the three components of tax law, it follows that the Cess Order 2007 is *ultra vires* art. 96 of the Federal I Constitution.

[24] The validity of the Cess Order 2007 was also challenged on the ground that it infringed art. 8 of the Federal Constitution. The principle underlining art. 8 is that a law must operate alike on all

persons under like circumstances. A law which does not operate equally on all persons who are similarly circumstanced is said to be discriminatory law. Discriminatory law will invariably be struck down for offending art. 8 of the Federal Constitution. The courts in this country have generally followed the pronouncements of the Indian Supreme Court in the formulation of what has come to be known as the reasonable classification test to determine discriminatory law. In the case of *Datuk Haji Harun Haji Idris v. PP* [1976] 1 LNS 19, Suffian LP adopted the formulation pronounced by the Indian Supreme Court in *Shri Ram Krishna Dalmia & Ors v. Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538 to the following effect:

> In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced the judgment in *Shri Ram Krishna Dalmia & Ors v. Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538, provided that:
>
> (i) The classification if founded on a intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> (i) The differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

[25] More recently, the Federal Court in the case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (supra)* also endorsed the test of reasonable classification propounded by the Indian Supreme Court in *Shri Krishna Dalmia v. Tendolkar (supra)*. This test divided into five categories was said to be:

> (a) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or thing may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute, the Court has to examine whether such classification is or can be reasonably regarded as based upon some *differentia* which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter

whether the provisions of the statue are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law, as it did in *Chiranjitlal v. Union of India* AIR [1951] SC 41, *State of Bombay v. FN Balsra* AIR [1951] SC 318, *Kedar Nath Bajoria v. State of West Bengal* AIR [1953] SC 404, *VM Syed Mohammad & Company v. State of Andhra* AIR [1954] SC 314 and *Budhan Choudhry v. State of Bihar* AIR [1955] SC 191.

(b) a statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case, the Court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum v. Mahboob Begum* AIR [1953] SC 91 and *Ramprasad Narain Sahi v. State of Bihar* AIR [1963] SC 215.

(c) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute, the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny, the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case, the Court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v. Anwar Ali Sarkar* AIR [1952] SC 75, *Dwarka Prasad v. State of Uttar Pradesh* AIR [1954] SC 224 and *Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs* 1955 AIR [1954] SC 424.

(d) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the Court will uphold the law as constitutional, as in *Kathi Raning Rawat v. The State of Saurashtra* AIR [1952] SC 123.

(e) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the government in making the selection or classification does not proceed on or follow such policy or principle, it has been held in *Kathi Raning Rawat v. The State of Saurashtra* AIR [1952] SC 123 that in such a case of the executive action but not the statute should be condemned as unconstitutional.

[26] On the facts of this case, s. 35(1) permitted the levy of cess on 'oil palm products' and for the 2nd respondent to specify 'the person or class of persons' on whom the cess was to be imposed. The term 'oil palm products', in turn, was defined in s. 2 in a wide ranging manner from the fruit to the finished product relating to palm oil. It is common knowledge that the category of persons involved within this range in the industry would include oil palm fruit producers, the millers, the refiners, the processors, the packers, the end producers, suppliers, wholesalers, the retailers and the distributors. The 2nd respondent chose to impose the cess only on the oil palm plantation owners and even then, only the private plantation owners. Based on these facts, not surprisingly the question posed by counsel for the appellants was, why select the oil palm fruit producers only and not the other persons who fall within the definition of oil palm products? What are the circumstances concerning the owners of oil palm plantations which distinguished them from the other persons who fell within the aforesaid range stipulated above?

[27] Applying the five categories adopted by the Federal Court in the *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (supra)* to the facts of this case, it is evident that s. 35(1) of the Act does not contain any basis or guidelines to assist the 2nd and

A 3rd respondents in the matter of selection or classification of the persons to be subject to the payment of the cess. In our judgment, the aforesaid section falls fairly and squarely within category (c) of the five categories set out in para. 25 herein. In other words, the powers conferred on the 2nd respondent to
B determine the persons to be subject to tax are so wide and yet, without any policy guidelines in the Act, so as to render the delegation to be arbitrary and uncontrollable. Accordingly, we agree with the submission of counsel for the appellants that this is a case where one category of persons was targeted for tax
C against others similarly situated without a reasonable basis for their selection. The singling out of the fruit producers only for the imposition of the cess was arbitrary and discriminatory. Accordingly, we hold the Cess Order 2007 to be a piece of discriminatory law.

D

[28] In the case of s. 77 of the Act, it confers a blanket authority on the 2nd respondent to exempt persons or class of persons from any provision of the Act. There are no guidelines to regulate the exercise by the 2nd respondent of his discretion.
E Indeed, there is a total absence of any qualification to the discretionary powers of the 2nd respondent. Accordingly, the discrimination can be said to be inherent in the statute itself causing s. 77, in our judgment, to fall within category (e) of the five categories adopted by the Federal Court. The Indian Courts
F over a period of time in decisions which have since been approved by our court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (supra)* have held that in such case, the court would strike down both the law as well as the executive action taken under such law. Accordingly, in the absence of any principle or policy for
G guiding the exercise of discretion by the 2nd and 3rd respondents in the Act, this court is not required to examine the basis contained in the affidavits affirmed by the 2nd respondent upon which the discretion is said to have been exercised. Our decision to this effect is also consistent with category (b) of the five
H categories adopted by the Federal Court which provides that, if, 'no reasonable basis of classification may appear on the face of it or deducible from the surrounding circumstances, or matters of common knowledge', then the court is bound to strike down the Act as amounting to a case of naked discrimination. We so hold
I to be the case with s. 77 of the Act.

[29] In any event, in our judgment, the claim in the affidavits affirmed by the 2nd respondent that the government linked companies may not be equal financially to the private sector companies and that they have additional obligations, even, if true, cannot constitute an intelligible differentia so as to satisfy the reasonable classification test adopted by the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (supra)*. Neither can these facts justify their exemption from having to pay the cess. We opine to this effect because the differentia according to the authorities must have a rationale in relation to the object sought to be achieved by the law in question. In our opinion, if the object of the Act was to raise funds for subsidising the price of cooking oil, then, to the extent that the beneficiaries of the cess collected were the consumers in Malaysia generally, there is no reason why the government linked companies should not pay the cess since according to para. 23 of the affidavit affirmed on behalf of the 2nd respondent, one of the objectives of the government linked companies is to cater for the needs of all Malaysians. The Supreme Court of India has struck down such exemption provisions as inherently discriminatory. In *KT Moopil Nair v. State of Kerala* [1961] 3 SCR 77, the Supreme Court accepted the argument that an exemption provision that gave the government arbitrary power to pick and chose who to give partial or total exemption from the operation of the statute was void under the equality guarantee. In *AN Parasuraman v. State of Tamil Nadu* AIR [1990] SC 40 at p. 39, a similar exemption provision was struck down for the following reason:

> The provisions of the Act indicate that the State Government has been vested with unrestricted discretion ... in picking and choosing the institutions for exemption from the Act ... such an unguided power bestowed on the State was struck down as offending Article 14 ...

Orders Of Court

[30] We allow Civil Appeal No. W-01-248-2010 and make an order in terms of prayers (a), (b), (d), (e), and (f) of the originating summons filed by the appellants in the Kuala Lumpur High Court. In the circumstances, we order the 1st respondent to refund to the appellants the cess collected by the 1st respondent from the appellants pursuant to s. 35(1) of the Act. This sum to be refunded together with interest at the rate of 4% p.a from 31 March 2010 till realisation.

A **[31]** We dismiss Civil Appeals No. W-01-282-2010 and W-01-537-2010 and confirm the order of the High Court judge in terms of prayer (h) of the originating summons.

[32] We order each respondents to pay costs of RM 15,000 to
B the appellant and deposit to be refunded.

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